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OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0175

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be granted.

I. Background

In April 2003, the individual's employer, a contractor at a Department of Energy (DOE) facility, requested an access authorization for the individual. During a background investigation, the local security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI resolved some of the information, but security concerns remained.

In November 2004, DOE informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his eligibility for access authorization. Notification Letter (November 15, 2004). The Notification Letter stated that the derogatory information regarding the individual falls within 10 C.F.R. § 710.8 (f) (Criterion F). DOE invoked Criterion F based on information in its possession that the individual "has deliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive Positions" Notification Letter at 2. According to the Notification Letter, the individual did not disclose the full extent of his past marijuana use on the questionnaire.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as the Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, a personnel security

specialist testified on behalf of the agency. The individual testified on his own behalf and also elected to call his supervisor as a witness. The transcript taken at the hearing shall be hereinafter cited as "Tr." Documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." The individual did not submit any exhibits.

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should not be granted because I cannot conclude that granting the clearance would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

In June 2000, the individual was at a bar drinking beer with some friends for about three hours. PSI at 8. He had also smoked marijuana that evening. While driving home, he ran into a telephone pole. PSI at 8. When the police arrived, an officer administered a breathalyzer test that returned a blood alcohol count (BAC) over the legal limit. PSI at 9. He was arrested for DWI. PSI at 15-16. The court ordered him to undergo a drug and alcohol evaluation, to attend alcohol counseling, and reduced his charge because it was a first offense. PSI at 10, 16. In February 2002, the individual had four beers with some friends at a bowling league. PSI at 14. On the way home, he fell asleep at the wheel and

ran into the guard rail. *Id.* The police arrived, and administered a breathalyzer test. *Id.* at 15. His BAC was over the legal limit, and he was arrested again for DWI. *Id.*

The individual began working for his employer, a DOE contractor, in October 2002. *Tr.* at 30. The contractor applied for a security clearance for the employee. *Id.* at 28. In April 2003, the individual completed a Questionnaire for National Security Positions (QNSP). Ex. 2. He disclosed both alcohol related arrests. Ex. 2 at 7. Question 24 (a) of the QNSP asks about the use of illegal drugs: “Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana . . . ?” The individual checked the “no” box. Ex. 2.

During a PSI on February 24, 2004, when the personnel security specialist asked if he had ever used drugs, the individual said that he had only tried marijuana once or twice during high school. PSI at 38. However, when the security specialist informed the individual that the record indicated that the individual smoked marijuana on the night of his first arrest, the individual then admitted to more extensive marijuana use. *Id.* He admitted using marijuana once every couple of months up until the night of the first arrest. *Id.* at 40. Further, he admitted that his marijuana use caused the judge to order him to attend a drug and alcohol evaluation after the first arrest in June 2000. *Id.* at 42. The security specialist asked the individual if he was trying to hide his marijuana use from the DOE, and the individual replied “[p]robably, because I figured if you found out that I did use it, it would be one of the things to stop me from [getting a security clearance].” PSI at 44.

B. DOE’s Security Concerns

The individual’s failure to respond honestly to the question about drug use on the QNSP raises valid and significant concerns under Criterion F. The DOE security specialist testified that “the security clearance process is based on trust, and in [Criterion F] you only talk about documenting a reflection of your honesty and reliability, your trustworthiness.” *Tr.* at 12. A breach of trust causes security to question whether the individual can be trusted to comply with security regulations. *Personnel Security Review*, Case No. VSA-0371, 28 DOE ¶ 83,015 (2000). In addition, an individual could be subject to coercion because of a dishonest act. *Personnel Security Hearing*, 28 DOE ¶ 82,829 at 85,871, OHA Case No. VSO-0466 (2001); *affirmed* (OS, April 3, 2002). Based on the record before me, I find that the individual deliberately misrepresented significant information during his QNSP. 10 C.F.R. § 710.8 (f). Thus the security concern regarding the omission is valid, and the agency has properly invoked Criterion F in this case.

C. Mitigation of Criterion F Concern

The individual’s employer testified at the hearing, and described the individual as a trustworthy and honest person who regularly worked overtime and had an admirable work ethic. *Tr.* at 27-30. The employer argued that he believed he had put such pressure on the individual to get a clearance that the individual omitted pertinent information in order to get his clearance. *Tr.* at 28, 30. He described the individual as an honest person whom he trusted with equipment and financial records. *Id.* at 29. He also testified that the individual has passed all of his drug tests. *Id.* at 28.

During the hearing the individual testified that he did not disclose his use of drugs because he believed that this information would prevent him from receiving a clearance. Tr. at 19. In addition, he thought that he did not need to disclose his drug use because his arrest record had been sealed. *Id.* at 19-20, 23. He assumed that no one could access that information. Tr. at 36. He also admitted to using marijuana “occasionally” after the arrest in 2000. Tr. at 22, 24.

D. Evidence of Mitigation

The key issue in this case is whether the individual has presented sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with DOE. During the PSI in 2004, the individual was very vague about his drug use. For instance, the security specialist reviewed the QNSP question about illegal drug use in the last seven years, and reminded the individual that he had answered “no.” She then asked:

Q. Have you ever used marijuana or any type of illegal drugs?

A. When I was in high school, I did try it once or twice, but I mean it hasn't gone beyond that.

Q. OK. Because the record indicated that you had been – admitted smoking marijuana the night of your first arrest.

A. I might have; I don't remember any. Probably admitted, yes.

Q. O.K. But – so that would have been after high school then, right?

A. Yes.

PSI at 38. After further questioning, the individual finally admitted to drug use in 2000.

Q. So is it safe to say that your last time you used it was in July of 2000 or June of 2000?

A. Yes.

PSI at 42. However, during the hearing, the individual changed his story and admitted he had used marijuana “for a short amount of time” after his June 2000 arrest. Tr. at 24. This contradicts his statement in the PSI that he last used marijuana on the night of the June 2000 arrest. PSI at 42.

As regards Criterion F, after reviewing the evidence in the record and assessing the credibility of the individual's testimony at the hearing, I conclude that he has not mitigated the security concern arising from the deliberate omission of significant information on his QNSPs. First, the record contains evidence of deliberate falsification or omission. See *Personnel Security Hearing*, Case No. VSO-0466, 28 DOE ¶ 82,829 at 85,872 (2001); *aff'd* (OS April 3, 2002) (describing factors to consider in mitigation of falsification). This is set forth above in excerpts from the individual's PSI and hearing testimony. The individual last used drugs well within the seven year period referenced in the QNSP. At the hearing, the individual stated that he understood the QNSP question, but omitted significant information in order to gain a clearance. Tr. at 22. He did this despite reading a form letter from the local security office explaining to all applicants for a clearance that drug use does not preclude them from receiving a clearance. Tr. at 22-23, Ex. 3. Second, the individual did not come forward voluntarily to correct the record. DOE discovered the falsification and confronted the individual with the truth. At the beginning of the PSI, the individual was given the opportunity to correct his QNSP, but did not. Tr. at 14-15. In fact, at the PSI, he did not admit using marijuana until the security specialist confronted him with the fact that she had information that he had used marijuana. Tr. at 15. Third, the individual maintained the falsification for approximately one year. He completed the QNSP in April 2003, and did not correct it until February 2004, during his PSI.

I find that the individual has not presented sufficient evidence of rehabilitation or reformation from his falsification. At the time of the hearing, it was approximately 15 months since the falsification in his QNSP response was corrected. That amount of time is not sufficient evidence of reformation from falsification, especially taking into consideration the fact that the individual did not come forward voluntarily to renounce his falsifications. See *Personnel Security Hearing*, Case No. TSO-0008, 28 DOE ¶ 82,910 (2003) (individual maintained falsehoods on QNSP until confronted by personnel security specialist in PSI one year later); *Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification is insufficient evidence of reformation). In summary, this is a case of deliberate falsification of security documents—the individual intended to hide his past from DOE security, and he was not forthcoming in his PSI until pressed by the personnel security specialist. Even though I do not find a pattern of falsification, nonetheless, not enough time has passed since his falsifications were uncovered for me to find any mitigation of the charge. As hearing officer, I must consider the relevant factors and circumstances connected with the individual's conduct, and I conclude that the individual has not mitigated the Criterion F security concern.

II. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (f) in suspending the individual's access authorization. The individual has not presented adequate mitigating factors that alleviate the legitimate security concerns of the DOE Operations Office. In view of these criteria and the record before me, I cannot find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find

that the individual should not be granted access authorization. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: July 22, 2005